

May 23, 2006

The Honorable Peter Hoekstra
Chairman
Permanent Select Committee on Intelligence
H-405, The Capitol
Washington, DC 20515

The Honorable Jane Harman
Ranking Member
Permanent Select Committee on Intelligence
H-405, The Capitol
Washington, DC 20515

Dear Chairman Hoekstra and Ranking Member Harman:

The Newspaper Association of America (NAA) and National Newspaper Association (NNA) represent the vast majority of daily and weekly U.S. newspapers of all sizes. NAA and NNA are writing in reference to the Committee's review of unauthorized disclosures of classified information and the related May 26th public hearing on the media's use of these unauthorized disclosures to inform the public on important public policy matters. Given the importance of the hearing's discussion on the flow of information to the public, we would ask that this letter expressing our views be submitted as part of the record.

Government's Concern over Leaks

Newspapers recognize that the government has a duty to preserve national security, and that some "leaks" may cause damage. The newspapers of America have no interest in causing such harm. Newspapers clearly have an obligation to act carefully and responsibly when they become aware of sensitive national security information that they are considering publishing. Part of this responsibility is the recognition that a free press is vital to a free people. Having fought to win our freedom, the Founding Fathers understood there is a delicate balance between the public's right to know and the need of the government to protect secrets, and they adopted the First Amendment as a testament to the special importance of a free press to democracy.

Over the years, Congress has enacted a variety of laws to punish disclosure of specific types of classified information, such as the identification of covert agents, information that would injure national defense, and cryptographic information or communication intelligence activity. But over those same years, Congress has resisted demands for a broad "Official Secrets Act" covering classified information generally – through two world wars and the Cold War that

followed and even in the face of serious threats to the nation's security and even before the massive overclassification of information became a practice.

Importance of Media's Role in Informing the Public

The media plays an important role in providing information to the public so that the government remains accountable to the people it serves. Any effort to impose criminal sanctions for disclosing classified information generally to the press must confront the reality that the daily discussion of possibly classified information, including through leaks, is an important instrument of communication that is employed on a routine basis by officials at every level of government. The motives of those who leak may be honorable or may be dishonorable. And the immediate effect of publication may arguably be harmful or beneficial. But the overall effect of public disclosures concerning the affairs of government is to enhance the people's ability to understand what the government is doing and to hold the government accountable.

Reporters' Use of Sources

We ask the Committee not to pursue legislation that would fundamentally alter the way in which government officials deal with the press, the way in which the press gathers and reports the news, and the way in which the public learns about its government. Almost every day, if not everyday, government officials – often described or referred to as whistleblowers, “senior department officials” or even “sources close to the President” – disclose to journalists and other unauthorized individuals, including Congress, “official government information” – some of which may be classified.

When government officials provide “authorized briefings” about national security matters, the customary practice for journalists is to confirm and to elaborate on the information with other official sources who are not authorized to disclose classified information. As a practical matter, few stories about national security, other than the mere transcription of official press briefings, are written without discussing classified information with government officials, who – no matter how high ranking – are often making unauthorized disclosures. These officials generally do so responsibly, aware that they are placing important information in the arena of public policy debate. This dialogue protects against the publication of information that truly could harm the national security by helping journalists avoid misunderstandings or unintended disclosures in their reporting. Government officials would avoid these important everyday

discussions if Congress criminalizes all unauthorized disclosures of classified information, especially given the extent of overclassification and the corresponding risk of inadvertent disclosure.

Stories of Great Public Interest Based on Leaks of Classified information

Articles of great public interest that report government decision-making, abuse or mismanagement are often based on leaks of classified information. For example, The Washington Post reported in December 2004 on a controversy in Congress over the relevance and escalating price of a previously undisclosed and highly classified program to build a new generation of stealth spy satellites. Before the article appeared, the debate over the merits of the multi-billion dollar program was taking place in closed sessions. In public, lawmakers made only cryptic references to a major acquisition program.

The Post article brought the controversy to light. The public learned that the projected cost of the secret satellite program had almost doubled from \$5 billion to nearly \$9.5 billion, and that some lawmakers believed that the costs far outweighed the benefits against today's adversaries. Judge David Tatel of the U.S. Court of Appeals for the D.C. Circuit cited The Post's reporting in his concurring opinion in the Judith Miller/Matt Cooper case as an example of reporting where a leak's value may far exceed its harm: "Despite the necessary secrecy of intelligence-gathering methods, it seems hard to imagine how the harm in leaking generic descriptions of such a program could outweigh the benefit of informing the public about billions of dollars wasted on technology considered duplicative and unnecessary by leading Senators from both parties."

This Washington Post story is but one example, among many, where important issues including government wrongdoing, abuse, corruption or concealment of a particular public safety problem were revealed through leaks of classified information. Consider these additional examples of information that came to light when classified information was disclosed to journalists:

- The exposure of workers at a Kentucky uranium plant to excessive amounts of plutonium and uranium;
- Government radiation and biological warfare experiments on unwitting Americans;

- Lapses in security creating vulnerability to espionage, such as the case of former CIA agent Edward Lee Howard;
- Waste, fraud, and abuse in the defense industry;
- Safety violations in nuclear weapons manufacturing processes and nuclear power plants;
- The extent of the government's activities in Vietnam through the Pentagon Papers;
- The efficacy of particular weapons systems;
- Human rights abuses in Latin America, Asia, and Africa;
- The recent revelation of secret CIA prisons in Eastern Europe for terrorists;
- Recent disclosures concerning the National Security Agency's secret telephone call database and the warrantless wiretapping program;
- Treatment of Iraqi prisoners at Abu Ghraib; and
- How pressure on the CIA to apprehend al Qaeda members has led in some instances to wrongful imprisonment based on thin or speculative evidence, revealing how complicated it can be to correct errors in a system built and operated in secret.

As these examples illustrate, leaks to the press, even of classified information, can serve as a vital source of information about the public issues and the operation of government.

Examples Where Newspapers or Broadcasters Withheld a Story or Sensitive Information in a Story

Reasonable minds from both sides of the aisle can vehemently disagree about whether a leak of classified information is a good leak or bad leak, whether national security was jeopardized or not, and whether the public interest was harmed or served. However, the role of the Fourth Estate must – at times – transcend these debates and carry on with its job of sharing important information to the public and let the perspective gained from the passage of time ultimately sort out the propriety of the leak. That said, the media have historically been careful in avoiding harm to national security, financial markets and personal safety, even while carrying out their constitutionally protected reporting on matters of public concern.

There are numerous instances where the media either imposed self restraint or honored the requests of government officials to withhold or delay publication of information that the officials believed to be harmful to our nation's security. Consider some of the following examples:

- CBS delayed its airing of the Abu Ghraib prison abuse story for two weeks at the request of military General Richard Myers, then Chairman of the Joint Chiefs of Staff, out of his concern for a tense and volatile moment in Iraq.
- In Dana Priest's article about CIA secret prisons, The Washington Post voluntarily withheld the names of the Eastern European countries involved in the covert program at the request of senior U.S. officials. The officials argued that the disclosure might disrupt counterterrorism efforts in those countries and elsewhere and could make these countries targets of possible terrorist retaliation. (The Post also withheld *non-classified* information obtained abroad because of the same U.S. government concerns.)
- A Chicago Tribune article documented the ease of learning the identities of undercover CIA agents by surfing the internet and using online commercial databases. One Tribune search produced a virtual directory of over 2,600 CIA employees, 50 internal agency telephone numbers and the location of approximately two dozen secret CIA sites in the United States. The Tribune refrained from disclosing in this article the identities of any CIA employees discovered through their Internet search or the search methods used out of concern for the safety of agency operatives and employees.
- Five major U.S. news outlets agreed to abridge video statements by Osama bin Laden based on government officials' concern that Bin Laden was using these videos to send subtle messages to other terrorists. This practice continues to date.
- The New York Times refrained from publishing its NSA wiretapping story at the request of the White House, which claimed the President had the legal authority to order these wiretaps. After a year-long delay, The New York Times decided to publish the story but omitted some details. The New York Times received criticism from some for publishing the article and criticism from others for not publishing it earlier.
- Everyday, journalists embedded with U.S. troops refrain from reporting on intelligence collection activities that might compromise strategies or techniques, and taking or broadcasting photographs or video that would reveal security measures at military encampments or installations, rules of engagement, and other categories of information that might endanger lives or harm operations.

Over-classification: When Everything Is Secret, Nothing is Secret

There is additional concern that this discussion on leaks brings to the forefront. The mere fact that a document is classified, even properly classified, does not mean that its disclosure will harm the national security. Not all classified information is the same. Erwin Griswold, the Solicitor General who argued the *Pentagon Papers* case, observed almost thirty years later that “[i]t quickly becomes apparent to any person who has had considerable experience with classified material that there is massive over-classification and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another.”

According to the latest report issued by Information Security Oversight Office (ISSO), the agency charged with keeping track of security classifications, 15.6 million documents – not pages – were classified in 2004. And, billions of pages remain classified from past years. As New York Times reporter Scott Shane observed in a 2005 article, federal departments are classifying documents at a rate of 125 per minute, even as they create new pseudo-classifications such as “sensitive but unclassified” or “sensitive security information.” According to J. William Leonard, the director of ISSO, “I’ve seen information that was classified that I’ve also seen published in third-grade textbooks.”

To paraphrase Justice Potter Stewart's opinion in the *Pentagon Papers* case, when everything is secret, nothing is secret. We all understand that far too much information is classified. The executive branch should be encouraged to classify less. Historically, when increased amounts of information are shielded from the public, government officials have a tendency to leak more information to Congress and the press. Newspapers encourage the Committee in its review on this issue to consider the findings of the Moynihan / Combust Commission on Protecting and Reducing Government Secrecy when it stated in its report to Congress, “the best way to ensure that secrecy is respected, and that the most important secrets remain secret, is for secrecy to be returned to its limited but necessary role. Secrets can be protected more effectively if secrecy is reduced overall.” *Summary of Findings and Recommendations, Report of the Commission on Protecting and Reducing Government Secrecy, Senate Document 105-2, 1997.*

No Need for Legislation

The laws on the books strike a balance between the public interests in preventing harm to the national security on the one hand, and preserving free discussion of governmental affairs on the other. While this balance may not be perfect in every situation, legislation that would make it a crime merely to receive or publish classified information generally that has been provided to the press without authority would destroy this delicate balance.

The problem of leaks of classified information does not lend itself easily to a legislative fix, and previous attempts to legislate an “Official Secrets Act” in this country have been rejected. Such a broad approach would chill the daily communications between government officials and the public, particularly between government officials and Congress and reporters. Overly broad legislation would also close down avenues for government “whistleblowers” to come forward to Congress or the media and expose wrongdoing, abuse and mismanagement.

Right now, the government has power to deal with those who engage in the unauthorized disclosure of classified information. Not only are there criminal statutes regarding the unauthorized release of information about covert agents, communication intelligence activity, and information that would aid foreign entities to the detriment of the United States – just to name a few – but also the government can remove security clearances, use polygraphs to uncover the source of a leak, and fire government employees for unauthorized disclosures. To date, we have not seen nor heard any evidence to suggest that these laws and sanctions are insufficient. Indeed, in October 2002, then former Attorney General John Ashcroft, in response to a Congressionally directed study of protections against the unauthorized disclosure of classified information, stated: “Accordingly, I am not recommending that the Executive Branch focus its attention on pursuing new legislation at this time.” *Report to Congress on Unauthorized Disclosures of Classified information, Office of Attorney General John Ashcroft, Oct. 15, 2002.* Assertions that there are gaps in the law and that legislation is needed are not enough to justify the criminalization of all unauthorized disclosures of classified information – our democracy demands more.

A Dialogue Between the Media and Intelligence Community

In our view, there is wide misunderstanding about the use of classified information, including the nature and causes of leaks, the adequacy of the laws that apply and the consequences of leaks. There are many ways these issues could be explored. One step has

already been taken that we believe has considerable benefit. For the past four years, representatives of the media have engaged in a constructive dialogue with the intelligence community on these important issues. Congressional representatives also participated in some of these sessions. This dialogue has taken the form of a series of candid, off-the-record discussions that we believe have been very valuable. We would be pleased to describe to the Committee, in greater detail, the progress that has been made, and the further progress that we believe could be made if the dialogue were to get additional support and emphasis. We believe one concrete step your Committee could take would be to endorse and support this dialogue and to participate in this forum.

Conclusion

Legislation that criminalizes all disclosures or the publication of classified information is anathema to a system that places sovereignty in the hands of the people. That has been the prevailing view for the first two and one-quarter centuries of our nation's existence and there is no compelling reason to change a system that has worked so well for so long to preserve the liberty of so many.

Sincerely,

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cc: Members, Permanent Select Committee on Intelligence